United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-2638

B

P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2638

GREENE COUNTY PLANNING BOARD,

Petitioner,

v.

FEDERAL POWER COMMISSION

Respondent,

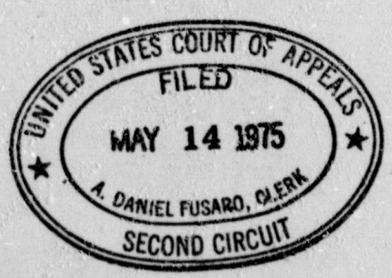
and

POWER AUTHORITY OF THE STATE
OF NEW YORK

Intervenor.

Petition for Review of Presidential Permit and Order

BRIEF OF INTERVENOR POWER AUTHORITY OF THE STATE OF NEW YORK



SCOTT B. LILLY
Attorney for
Power Authority of
the State of New York
10 Columbus Circle
New York, New York 10019
(212) 265-6510

OF COUNSEL:

Morgan, Lewis & Bockius
1140 Connecticut Avenue, N.W.
Washington, D. C. 20036

May 13, 1975

4

TABLE OF CONTENTS

CASES, STATUTES AND OTHER AUTHORITIES CITED

Cases

Page

Page

FPC Proceedings

United States Constitution

Statutes

Page

Regulations

Miscellaneous

ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction under Section 313(b) of the Federal Power Act over a petition to review a Presidential Permit authorizing construction of a tower and connection of an electric transmission line segment at the international border and a procedural Order both issued pursuant to Executive Order 10485?

2. Whether a petition requesting revocation of a Presidential Permit authorizing construction of a tower and connection of a line segment at the international border issued pursuant to an Executive Order based upon the President's Constitutional power over foreign relations and as Commander in Chief presents a nonjusticiable political question?

3. Whether, in light of the explicit Congressional purpose set out in Section 7(d) of ESECA to expedite the prompt construction of the tower and connection of the line at the international border to enable importation of Canadian hydroelectric power and thereby reduce the shortage of petroleum products in the United States, that section should be construed as an exemption from only one of the time-consuming requirements of the National Environmental Policy Act?

4. Was the finding that issuance of the Presidential Permit is consistent with the public interest in the proper conduct of the foreign relations of the United States arbitrary or capricious when based upon the recommendations of the Secretary of State and the Secretary of Defense and the finding of Congress in Section 7(d) of ESECA that issuance of this

Permit would further the U.S. foreign policy of reducing our dependence on foreign oil?

5. Did the FPC abuse its discretion in denying a public hearing in the proceeding under Executive Order 10485 on the Presidential Permit and denying consolidation with the proceedings under the Power Act on the Blenheim-Gilboa and Breakabeen hydroelectric projects?

STATEMENT OF THE CASE

I. The Nature Of The Case

This case involves the issuance of a Presidential Permit pursuant to Executive Order 10485 and an exemption from the National Environmental Policy Act (NEPA) directed in section 7 (d) of the Energy Supply and Environmental Coordination Act of 1974 (ESECA). The Presidential Permit was issued to the Power Authority of the State of New York (the State Power Authority) for one tower and a transmission line segment extending therefrom to the international border of the United States and Canada near Fort Covington, Franklin County, New York to connect with a like line of the Quebec Hydro-Electric Commission (Hydro-Quebec).

Executive Order 10485 provides in pertinent part:

> "WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas; and
>
> ***
>
> "NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:
>
> Section 1. (a) The Federal Power Commission is hereby designated and empowered to perform the following-described functions:
>
> (1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

***

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Commission shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Federal Power Commission, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Commission shall submit to the President for approval or disapproval the application for a permit with the respective views of the Commission, the Secretary of State and the Secretary of Defense."

ESECA Section 7 (d) provides:

"In order to expedite the prompt construction of facilities for the importation of hydro-electric energy thereby helping to reduce the shortage of petroleum products in the United States, the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485 of September 3, 1953, for the construction, operation, maintenance, and connection of facilities for the transmission of electric energy at the borders of the United States without preparing an environmental impact statement pursuant to section 102 of the National Environmental Policy Act of 1969 (83 Stat. 856) for facilities for the transmission of electric energy between Canada and the United States in the vicinity of Fort Covington, New York."

II. The Proceeding On The Presidential Permit

On September 21, 1973, the State Power Authority filed, pursuant to Executive Order 10485, its application for a Presidential Permit. In accordance with the Executive Order, the application was

filed with the Federal Power Commission (FPC) [R 1-12].

On October 16, 1973, the FPC issued a notice of the application which stated that any person desiring to be heard could file a petition to intervene or a protest [R 45-46].

On November 7, 1973, the Greene County Planning Board (the County Planning Board) filed a petition requesting (1) leave to intervene, (2) a public hearing, (3) an environmental impact statement "covering the proposed facilities and the entire 765 kv network, and related generation of which facilities described in the application will be a part," (4) consolidation with pending proceedings on the State Power Authority's Blenheim-Gilboa (Gilboa-Leeds line) and its proposed Breakabeen hydroelectric projects, and (5) the right to be present at any and all conferences between the State Power Authority and the FPC [R 47-50].

The State Power Authority opposed the petition on the ground that the County Planning Board failed to demonstrate any interest in the facilities which were the subject of the application.

ESECA became law on June 22, 1974.

On August 2, 1974, the FPC transmitted to the Secretary of State and the Secretary of Defense a letter regarding the Presidential Permit applied for and enclosed a copy of the application, exhibits, a supplemental letter, a draft permit incorporating terms and conditions the Secretaries had required in similar situations, and a copy of the agreement between the State Power Authority and Hydro-Quebec

[R 120-127]. Favorable replys on the application were received from the two Secretaries on August 19 and 22, 1974 [R 128,129].

On September 13, 1974, the FPC issued the Presidential Permit and an Order. The Order granted the County Planning Board's petition to intervene but denied its other requests [R 130-133].

The County Planning Board's petition for rehearing was denied by order issued October 25, 1974 [R 140,144-150].

III. The Facts

The State Power Authority and Hydro-Quebec have entered into an agreement providing for the sale and exchange of electric power and energy between the parties to take advantage of the diversity between their respective system loads [R 103]. Under the agreement, the State Power Authority will import 800 megawatts of power from Hydro-Quebec beginning in 1977, the deliveries to be made to the State Power Authority during the months of April through October [R 105]. The agreement also provides that the State Power Authority shall return energy to Hydro-Quebec during the "Winter months" [R 109]. [1]

---

1 A supplemental agreement provides for mutual assistance between the State Power Authority and Hydro-Quebec to enhance reliability of service in New York State and Quebec.

To get the power to the United States border, Hydro-Quebec will construct transmission facilities from a substation near its Beauharnois hydroelectric station in Quebec to the international border near Fort Covington, Franklin County, New York [R 103].

To bring the power into the United States, the State Power Authority will construct a tower on the United States side of the border to support the segment of its transmission line which will connect with the Hydro-Quebec line at the international border [R 6].

To get the power from the international border to a point on the New York portion of the U.S. interconnected transmission system, the State Power Authority will construct a 765 kv line to its proposed Massena Substation, located about 20 miles south of the border and from there to a proposed substation at Marcy which will be adjacent and connected to Niagara Mohawk Power Corporation's Edic Substation in the vicinity of Utica [R 104]. From that point the power will be transmitted over existing lines to load centers throughout the interconnected system, including lines to the Consolidated Edison Company system facilities at Pleasant Valley and from there on its lines to New York City.

Article VII of the New York Public Service Law requires a Certificate of Environmental Compatibility and Public Need from the New York Public Service Commission for the 765 kv line extending from the border to the Edic substation near Utica. A proceeding on an application for such a certificate is nearing completion. The Greene County Planning

Board did not seek to participate in the proceeding.

The electric generating and transmission system of the State of New York is interconnected with adjacent electric systems in New England and in the Pennsylvania, Maryland and New Jersey areas and through those systems to other adjacent areas [R 95].

The State Power Authority's existing 1000 megawatt Blenheim-Gilboa Pumped Storage Project No. 2685 is located on Schoharie Creek in Schoharie County, New York, and its proposed 1000 megawatt Breakabeen Pumped Storage Project No. 2729 is to be located immediately downstream from Blenheim-Gilboa. To deliver power from the Blenheim-Gilboa project to a point on the New York State interconnected electric system at Leeds, the State Power Authority is seeking FPC approval of location and design plans for immediate construction of a 345 kv line from Gilboa to Leeds. It is also seeking a license for a second 345 kv line from Breakabeen to Leeds. Parts of the two 345 kv circuits would cross Greene County. The County Planning Board has been granted intervention in each proceeding and is participating actively in both cases.

In the FPC proceeding for approval of the location and design of the 345 kv line from Gilboa to Leeds, the Administrative Law Judge has already recommended that a 345 kv circuit be constructed from Gilboa to Leeds. He directed that the line be constructed on a right-of-way of sufficient width and towers specially designed to accommodate a second 345 kv circuit in the event the proposed Breakabeen Project or an alternative thereto is built. He also directed that the line be designed to permit

the two 345 kv circuits to be converted at some future date to a single circuit 765 kv line without altering the towers or right-of-way if that much transmission capacity is ever needed between Gilboa and Leeds. The Law Judge's initial decision is now before the FPC for a final decision. The planning for the future exemplified by the Administrative Law Judge's recommendation is the type of planning the Commission is required to perform to insure that the Blenheim-Gilboa Project No. 2685 "is best adapted to a comprehensive plan" in compliance with Section 10(a) of the Power Act.

The County Planning Board states that the power to be imported from Canada will be transmitted over a 765 kv line from Edic to Gilboa on its way to New York City [Br. 4]. There is no present proposal or plan to construct a 765 line from Marcy-Edic to Gilboa [R 94]. A 765 line along such a route is one of several possible alternatives that would be available if there arose a need to strengthen the proposed 765 kv statewide transmission system. No line for that purpose will be needed, if at all, until the 1980's -- long after the facilities authorized by the Presidential Permit to exchange power with Hydro-Quebec have been constructed and the Gilboa-Leeds line and the Breakabeen hydroelectric project have been completed [R 94].

SUMMARY OF ARGUMENT

This Court does not have jurisdiction of this case. The County Planning Board alleges jurisdiction to review the Presidential Permit under Section 313 (b) of the Power Act. Section 313 (b) provides for judicial review in the Courts of Appeal for orders issued in "a proceeding under this Act". The Presidential Permit, however, was issued in a proceeding under Executive Order 10485. The Commission's hydroelectric licensing authority under Part I of the Federal Power Act is inapplicable because the tower and transmission line segment at the international border authorized by the Presidential Permit are not project works of an FPC licensed hydroelectric project. Section 202 (e) of Part II of the Power Act is inapplicable because State power authorities are exempted therefrom. Since the Power Act is inapplicable to the facilities authorized by the Presidential Permit issued under Executive Order 10485, the proceeding on the Presidential Permit was not and was not required to be a proceeding under the Power Act. Accordingly, this Court must dismiss the petition for review for lack of jurisdiction.

Executive Order 10485 is based upon the powers of the President of the United States over foreign relations and as Commander in Chief. Issuance of the Presidential Permit has been determined to be in accordance with the proper conduct of the foreign relations of the United States. In order to grant the relief requested by the County

Planning Board, this Court must order the President of the United States or one of his delegatees or take it upon itself to revoke the Presidential Permit. For this Court to take such action would be to make itself rather than the President of the United States the final decision-maker in this field of foreign affairs and would thus violate the principle of separation of powers under our Constitution. Consequently, this case presents a non-justiciable political question.

Assuming arguendo that this Court concludes that it has jurisdiction and that judicial review is available, the following arguments demonstrate that the Presidential Permit was lawfully issued in compliance with Executive Order 10485 and Section 7 (d) of ESECA.

Section 7 (d) of ESECA exempted the issuance of this Presidential Permit from all provisions of NEPA. The County Planning Board argues that Section 7 (d) provided an exemption from only "one potentially time-consuming requirement" of NEPA. That position flies in the face of Congress' purpose in enacting Section 7 (d): to "expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to reduce the shortage of petroleum products in the United States".

The FPC finding that issuance of the Presidential Permit was in the public interest in the proper conduct of the foreign relations of the United States was not arbitrary or capricious. It was based upon the favorable recommendations of the Secretary of State and the Secretary

of Defense and the finding of Congress in the Section 7 (d) of ESECA that issuance of this permit would advance the foreign policy of the United States of reducing our dependence on foreign oil. Nor did the FPC abuse its discretion under Executive Order 10485 in denying requests for a public hearing on the Presidential Permit and consolidation with the proceedings on two hydroelectric projects under Part I of the Power Act. The County Planning Board failed to raise any genuine issues of relevant fact which would warrant a hearing. Moreover, the County Planning Board was provided basic procedural due process in the Presidential proceeding. Consolidation of the proceedings under Executive Order 10485 on the Presidential Permit and the proceedings under Part I of the Power Act on the two hydroelectric projects would have been wholly unwarranted because those proceedings were based upon different legal authority and did not present common questions of law or fact. Furthermore, in the proceedings on the two hydroelectric projects the County Planning Board has been or will be afforded public hearings, the opportunity to present all relevant testimony, cross-examination, preparation of an environmental impact statement and judicial review.

ARGUMENT

I. THE PETITION FOR REVIEW MUST BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE PRESIDENTIAL PERMIT AND ORDER WERE ISSUED PURSUANT TO EXECUTIVE ORDER 10485 AND SECTION 7 (d) OF THE ENERGY SUPPLY AND COORDINATION ACT OF 1974 (ESECA) AND NOT IN A PROCEEDING UNDER THE FEDERAL POWER ACT AS REQUIRED BY SECTION 313 (b) THEREOF TO CONFER JURISDICTION, AND NO OTHER ACT OF CONGRESS CONFERS JURISDICTION ON THIS COURT TO REVIEW IN THE FIRST INSTANCE SAID PERMIT OR ORDER.

The Courts of Appeal are not courts of general jurisdiction but have only that jurisdiction specifically conferred upon them by acts of Congress. U. S. Const. Art. III, § 1; American Federation of Labor v. NLRB, 308 U.S. 401, 404 (1940); Arizona State Dept. of Public Welfare v. HEW, 449 F. 2d 456, 463 (9th Cir. 1971). Consequently, a party seeking review of agency action in a Court of Appeals must establish jurisdiction under an act of Congress; otherwise the petition for review must be dismissed.

Greene County alleges jurisdiction to review the Presidential Permit and Order under Section 313(b) of the Power Act, which provides:

> "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business...by filing in such court, within 60 days after the order of the Commission upon the application for rehearing, a written petition praying

> that the order of the Commission be modified or set aside in whole or in part. ..." (Emphasis added). 16 U.S.C. §825 1(b) (1974).

The plain language of Section 313(b) limits this Court's jurisdiction to FPC orders issued in "a proceeding under this Act". As shown below, however, the Presidential Permit and Order were not issued in a proceeding under the Power Act.

A. The Presidential Permit and Order were issued under authority of Executive Order 10485 and Section 7(d) of ESECA.

The State Power Authority filed its application for the Presidential Permit "under the provisions of Executive Order 10485 of September 3, 1953", and not, as the County Planning Board asserts, under Section 202(e) of the Power Act.

After the application was filed, ESECA became law and "...authorized and directed [the FPC] to issue [the] Presidential Permit pursuant to Executive Order. ..." The Presidential Permit recites:

> "Pursuant to Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974 (Public Law 93-319, approved June 22, 1974, 88 Stat. 246), the provisions of Executive Order No. 10485, dated September 3, 1953, and the Commission's Rules and Regulations under said order, permission is hereby granted to Permittee to construct, operate, maintain and connect the electric transmission facilities described in Article 2 below at the inter-

national border between the United States and Canada upon the conditions hereinafter set forth." [R 136]. [2]

The Order of September 13, 1974, granting the County Planning Board's petition to intervene but denying its requests for a public hearing, an environmental impact statement covering all related facilities and consolidation with pending proceedings on the State Power Authority's Blenheim-Gilboa and proposed Breakabeen hydroelectric projects was issued pursuant to Section 3 of Executive Order 10485, which provides:

> "The Federal Power Commission is authorized to issue such rules and regulations and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order." [3]

To construe the action on the Presidential Permit as a proceeding under the Power Act requires that either (1) a provision of the Power Act also applies to such action but was unlawfully ignored, or (2) the authority cited for such action is merely an implementation of the Power Act.

The Board argues that the FPC should have exercised its

---

2 The Order issued October 25, 1974, denying the County Planning Board's application for rehearing reiterated that the authority for issuance of the Presidential Permit and procedural Order was as stated in the quote [R 144-45].

3 The denial of the request for an environmental impact statement was also authorized by Section 7(d) of ESECA.

"comprehensive plan judgment" under Section 10(a) of Part I of the Power Act in issuing the Presidential Permit because the proposed Gilboa to Leeds line, which is subject to FPC jurisdiction under Part I and would traverse Greene County, is allegedly a segment of a 765 kv line that would run from the facilities at the international border authorized by the Presidential Permit through Greene County and on toward New York City.

Section 7(d) of ESECA refers to Executive Order 10485. Executive Order 10485 is predicated on the President's Constitutional power. It refers to Section 202(e) of Part II of the Power Act in the first WHEREAS clause thereof. From this Greene County argues that the FPC unlawfully failed to exercise jurisdiction under Section 202(e) of Part II of the Power Act over the tower and line segment authorized by the Presidential Permit as well as the remainder of the line. An examination of FPC jurisdiction under the Power Act and Executive Order 10485 demonstrates that (1) neither the tower and line segment authorized by the Presidential Permit nor the remainder of the line required by the power agreement are subject to FPC licensing jurisdiction under Part I of the Power Act, and thus Section 10(a) thereof is inapplicable and (2) the State Power Authority is exempt from FPC regulatory jurisdiction under Section 202(e) of Part II of the Power Act because it is a State authority. Consequently, in issuing the Presidential Permit and Order, the FPC exercised only the Constitutional power of the

President delegated to it and its authority under Section 7(d) of ESECA. Thus, no proceeding under the Power Act was possible, and a petition for review under Section 313(b) does not lie in this Court.

B. The tower and line segment at the international border authorized by the Presidential Permit as well as the remainder of the line required by the Power Agreement are not subject to FPC hydroelectric licensing jurisdiction under Part I of the Federal Power Act.

The Supreme Court recently held that the provisions of Part I of the Power Act and its legislative history conclusively demonstrate that Congress intended to confer on the FPC licensing jurisdiction under Part I only over the construction and operation of hydroelectric facilities. Chemehuevi Tribe of Indians v. FPC, 43 U.S.L.W. 4334 (U.S. March 3, 1975).

The FPC's licensing jurisdiction is set forth in Section 4(e) of Part I, which authorizes it:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states. ..." (Emphasis added) 16 U.S.C. §797(e) (1974).

The listing in Section 4(e) of facilities subject to license, e.g., dams, power houses, transmission lines, is by way of example and does not mean that the FPC licenses all such facilities. As the court stated in Pacific Power and Light Co. v. FPC:

> "The language used by Congress seems perfectly clear. 'Or other project works' means that the things theretofore listed in the sentence are project works. 'Reservoirs, power houses, transmission lines or other project works' includes reservoirs which are project works, power houses which are project works, and transmission lines which are project works. The expression does not include reservoirs, power houses, or transmission lines which are not project works." (Emphasis added). 184 F.2d 272, 274 (D.C. Cir 1950).

Such "project works" must be licensed on condition that the "project" be best adapted to a comprehensive plan for developing the waterway. 16 U.S.C. §803(a) (1974).

The limit of FPC licensing jurisdiction under Part I is determined by the meaning of the terms "project works" and "project". "Project works" is defined as "the physical structures of a project". 16 U.S.C. §796(12) (1974). Those transmission lines which are the physical structures of a project are determined from the definition of "project" in Section 3(11):

> "'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected

> therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." (Emphasis added). 16 U.S.C. §796(11) (1974).

Thus, only a transmission line which transmits power from a licensed power house to the point of junction with the distribution system or with the interconnected primary transmission system is a "primary line" subject to FPC jurisdiction. A transmission line which forms part of a distribution system or a segment of an interconnected primary transmission system is a "primary line" subject to FPC jurisdiction. A transmission line which forms part of a distribution system or a segment of an interconnected primary transmission system is not a "project work" and therefore is not subject to FPC licensing jurisdiction. As the court in Pacific Power and Light Co. v. FPC said:

> "[U]nless the nature, purpose and function of the line is such as that it is a part of a power project, it does not fall within the statutory definitions which establish the authority of the Commission, and is not to be forcibly enveloped in the statutory language by the compulsion of a Congressional purpose inadequately expressed." 184 F.2d at 275.

The record demonstrates that the tower and line segment authorized by the Presidential Permit and the remainder of line required by the Power agreement are not "project works" subject

to FPC licensing jurisdiction under Part I. The power contract provides:

> "The parties hereto having recognized that an interconnection between the power systems in Quebec and New York will be mutually advantageous because of the diversity between their respective system loads, the parties hereby enter into a power contract providing for the sale and exchange of electric power and energy as hereinafter set forth." [R 103, 104]. (Emphasis added)

The FPC correctly recognized that

> "The transmission line proposed to be constructed... by PASNY at the United States-Canadian border... is part of the proposed international interconnection known as the Massena-Quebec 765 kV Tie, which is provided for in the Power Contract. ..." [R 120].

Thus, the tower and line segment and the remainder of the 765 kv line to Utica will not serve as "primary lines" of any of PASNY's licensed hydroelectric projects. Rather, the tower and line segment authorized by the Presidential Permit and the remainder of the line required by the power agreement will constitute a segment of the interconnected primary transmission system in New York and the Province of Quebec. Therefore, none of the towers and lines required by the power agreement are "project works" subject to FPC jurisdiction under Part I. Consequently, the FPC's comprehensive planning function under Section 10(a) of Part I of the Power Act did not come into play in the issuance of the Presidential Permit.

C. The State Power Authority is exempt from FPC regulatory jurisdiction over the export of power under Section 202(e) of Part II of the Federal Power Act because it is a State authority.

The Power Agreement provides for the export of "payback" or emergency energy to Quebec during the winter months under certain conditions [R 100, 109]. The export of electric energy from the United States to a foreign country by certain entities is subject to FPC regulatory jurisdiction under section 202(e) of Part II of the Power Act, which provides in pertinent part:

> "...[N]o person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. ..." (Emphasis added). 16 U.S.C. §824a(e) (1974).

Although Section 202(e) is referred to in Executive Order 10485, [4] it is inapplicable to the subject of the Presidential Permit because the State Power Authority is exempted from Section 202(e) by virtue of Section 201(f).

Section 201(f) provides:

> "No provision in this Part shall apply to, or be deemed to include, the United States, a state or any political subdivision of a state, or any agency, authority, or

---

4 Note that Section 202 (e) covers only the act of exporting electric energy whereas Executive Order 10485 covers both the acts of exporting and importing electric energy and the construction and connection at the international border of the necessary tower and line segment.

> instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto." (Emphasis added). 16 U.S.C. §824(f) (1974).

The Power Authority of the State of New York is of course a State authority and a political subdivision of New York. Lake Ontario Land Development & Beach Protection Ass'n, Inc. v. FPC, 212 F.2d 227 (D.C. Cir. 1954). Thus, Section 202(e) is applicable to a "person". The term "person" as defined in the Power Act does not include a State authority such as the State Power Authority. Section 3 provides:

> "The words defined in this section shall have the following meanings for purposes of this Act, to wit:...
>
> "(4) 'person' means an individual or a corporation." (Emphasis added). 16 U.S.C. §796(4) (1974).

The State Power Authority is clearly not an "individual". Thus, in order for the State Power Authority to be a "person" under Section 202(e), it would have to be a "corporation", which term is defined in Section 3(3) as:

> "[A]ny corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined." (Emphasis added). 16 U.S.C. §796(3) (1974).

The term "municipality" is defined in Section 3(7) as:

> "[A] city, county, irrigation district, drainage district, or other political subdivision or agency of a State

> competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power." (Emphasis added). 16 U.S.C. §796(7).

The State Power Authority is a "municipality" under the Power Act. Power Authority of the State of New York, Project No. 2000, 12 FPC 178 181 (1953), aff'd Lake Ontario Land Development & Beach Protection Ass'n.v. FPC, supra. Since the State Power Authority is a "municipality" it cannot be a "corporation", and since it is neither an individual nor a corporation, it cannot be a "person" under Section 202(e). Thus, Section 202(e) does not by use of the term "person" make specific reference to political subdivisions or authorities of a State such as the State Power Authority. Accordingly, the State Power Authority is exempted from Section 202(e) by Section 201(f) because it is a State authority. Therefore, the State Power Authority was not required to obtain an FPC order under Section 202(e) for the export of power to Canada.

The legislative history of Part II of the Power Act demonstrates that the exemption of State authorities from the provisions of Section 202(e) furthers the purpose of Congress in enacting Part II. The Report of the Senate Committee on Interstate Commerce states:

> "[T]he Committee has liberalized Title II of the original bill and endeavored to remove all possible grounds for the charge that it imposes harsh or burdensome restrictions upon the electric industry. The revision has also removed every encroachment upon the authority of the States. The revised bill would impose

> Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over state matters." (Emphasis added). Senate Report No. 621, 74th Cong., 1st Sess., at 18 (1935).

Federal encroachment upon such State authority would be contrary to the purpose of Congress in enacting Part II of the Power Act. [5]

The County Planning Board asserts that the FPC's regulations under the Executive Order "specifically integrate the Executive Order with Section 202(e)". Section 32.50(b) of those regulations merely states that "in connection with applications hereunder, attention is directed to" the regulations issued pursuant to Section 202(e). This cross-reference is hardly an "integration". In any event, a regulation cannot make a statutory provision applicable to one who is exempted therefrom by the terms of the statute itself.

---

5 United States v. Public Utilities Commission of the State of California, 345 U.S. 295 (1952), holding that the term "person" includes a municipality" in connection with FPC regulation of electric rates in interstate commerce under Sections 201(d), 205(a), and 206(a), is easily distinguished. The Supreme Court refused to follow the literal words of the Power Act in that circumstance because it would bring about an end contrary to the purpose of the Power Act to grant relief to political subdivisions of the States aggrieved by by the failure of a public utility selling power to them to satisfy the rate requirements of Part II of the Power Act. 345 U.S. at 312, 313. The Court recognized, however, that the exclusion of "producing municipalities" from FPC jurisdiction under Part II was intended by Congress. 345 U.S. at 313 n.23. PASNY is, of course, a "producing municipality" since it owns and operates several electric power plants.

In summary, the provisions of Parts I and II of the Power Act are inapplicable to the tower and line segment authorized by the Presidential Permit, to the remainder of the line required by the power agreement and to the export of power by the State Power Authority. The Presidential Permit and Order were independently issued pursuant to Executive Order 10485 and Section 7(d) of ESECA.

D. No other act of Congress confers jurisdiction on this Court to review in the first instance the issuance of the Presidential Permit or Order.

Neither Executive Order 10485 nor Section 313(b) of the Power Act confers jurisdiction on this Court to review the Presidential Permit. Where the relevant authority makes no provision for direct review in a court of appeals, an aggrieved party may avail himself of Section 10 of the Administrative Procedure Act (APA). 5 U.S.C. §701 et seq.

Section 10(b) of the APA provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. ..." (Emphasis added). 5 U.S.C. §703

County Planning Board may not, however, establish jurisdiction in this Court in the first instance under Section 10 because the requirement

that the court be one of "competent jurisdiction" means that there must be a Federal statute conferring jurisdiction on the Court to review the agency action. There is no Federal statute conferring jurisdiction on the courts of appeal to review in the first instance the issuance of Presidential Permits. Accordingly, judicial review must be obtained, if at all, in another court. Arizona State Dept. of Public Welfare v. HEW, supra; Robertson v. FTC, 415 F.2d 49 (4th Cir. 1969); Rettinger v. FTC, 392 F.2d 454 (2d Cir. 1968).

Rettinger states the rule in this Circuit. After the petitioner failed to establish jurisdiction under a special statutory review provision, he attempted to establish jurisdiction in this Circuit in the first instance on the basis of the APA. This Court responded:

> "Petitioner also relies upon the Administrative Procedure Act. Under what is now 5 U.S.C. §§701-706, Rettinger may be entitled to obtain judicial review now of a Commission interpretation which is allegedly arbitrary and capricious. That does not end the matter, however. In Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966), upon which Rettinger relies, review was sought in a civil action brought in the district court; here in contrast, Rettinger seeks review from the circuit court in the first instance. The difference is fatal to his position. Where no statute adequately specifies the proper procedure and court for review, the APA, 5 U.S.C. §703 provides for review. ... This statute apparently intends a district court proceeding. Therefore, Rettinger's remedy under the APA, if remedy there be, is in the district court... ." (Emphasis added, footnotes and citations omitted). 392 F.2d at 457.

County Planning Board cannot establish jurisdiction in this Court in the first instance under Section 313(b) of the Power Act.

No other act of Congress, including the APA, confers jurisdiction on this Court to review in the first instance the issuance of a Presidential Permit and Order. Consequently, the petition for review must be dismissed for lack of jurisdiction.

II. THE PETITION FOR REVIEW MUST BE DISMISSED BECAUSE IT PRESENTS THE NON-JUSTICIABLE POLITICAL QUESTION OF WHETHER THE PRESIDENTIAL PERMIT WAS ISSUED IN ACCORDANCE WITH THE PROPER CONDUCT OF THE FOREIGN RELATIONS OF THE UNITED STATES.

In order to grant the relief requested by the County Planning Board, this Court must order the President of the United States, or one of his delegatees, or take it upon itself to revoke a Presidential Permit issued pursuant to Executive Order 10485, which is based on the President's powers over foreign relations and as Commander in Chief and which has been determined to be in accordance with the proper conduct of the foreign relations of the United States.

Executive Order 10485 provides in pertinent part as follows:

> "WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas; and
>
> ***
>
> "NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as . . . ."

The judicial power is restricted by Article III of the Constitution to "cases" and "controversies":

> "Embodied in the words 'cases' and 'controversies' are two complimentary but somewhat different limitations. In part both words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the

> judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.
>
> "... Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question ... ." (Footnotes omitted). Flast v. Cohen, 392 U. S. 83, 95 (1968).

The political question doctrine focuses on the nature of the issue presented to the Court. DaCosta v. Laird, 471 F. 2d 1146, 1152 n. 10 (2d Cir. 1973). It derives primarily from the separation of powers within the Federal Government under the Constitution. Powell v. McCormack, 395 U. S. 486, 519 (1969). It is well established that the Federal Courts will not adjudicate political questions. Powell v. McCormack, supra; Coleman v. Miller, 307 U. S. 433 (1939); Oetjen v. Central Leather Co., 246 U. S. 297 (1918). In Baker v. Carr, 369 U. S. 186 (1962), the Supreme Court synthesized its prior decision on this doctrine as follows:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id at 217.

There is no dispute in this case that Executive Order 10485 was issued pursuant to the powers of the President of the United States over foreign relations and as Commander in Chief. In order to grant the relief requested -- the revocation of the Presidential Permit -- this Court must make the initial policy determination of whether the issuance of the Presidential Permit and its revocation are in accordance with the proper conduct of the foreign relations of the United States. To enter into such an inquiry would, in and of itself, express a lack of the respect due the Executive.

The foregoing arguments demonstrate that the petition for review should be dismissed with prejudice for want of jurisdiction and justiciability. Assuming arguendo that this Court concludes that it has jurisdiction and judicial review is available, the following arguments demonstrate that the Presidential Permit was lawfully issued in compliance with all substantive and procedural requirements of Executive Order 10485 and Section 7 (d) of ESECA.

III. THE PETITION FOR REVIEW MUST BE DISMISSED FOR LACK OF STANDING BECAUSE THE COUNTY PLANNING BOARD FAILED TO ALLEGE ANY INJURY-IN-FACT CAUSED BY ISSUANCE OF THE PRESIDENTIAL PERMIT.

To establish standing under Sierra Club v. Morton, 405 U. S. 727 (1972), requires a showing that the challenged action has caused injury in fact to a legally protected interest of the County Planning Board. This requirement limits judicial review to those who have a direct stake in the outcome and prevents judicial review "at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process". Id. at 740. The record demonstrates that the County Planning Board's interest is confined to planning for one county and that the action challenged herein will not injure that interest.[6]

First, the County Planning Board admits that its interest is confined by State law to "developing a comprehensive plan to guide future growth and development in the County. ..." (Emphasis added). [R 47]. Thus, its allegations of injury must be judged in light of that limitation.

---

6 Perhaps in recognition of its failure to allege injury in fact in the proceeding on the Presidential Permit, the County Planning Board has alleged new facts in its brief filed with this Court. Such new allegations cannot form the basis for standing because they were not raised in the Presidential Permit proceeding. Sierra Club v. Morton, 405 U. S. at 735, 736 n. 8.

The County Planning Board first alleged:

> "... the facilities to be constructed [under the Presidential Permit] are part of a comprehensive integrated plan including Project Nos. 2685 and 2729 and additional generating and transmission facilities which will have a materially adverse impact on Greene County." [R 47].

The record shows that the "facilities to be constructed" under the Permit and those required by the power agreement are to be located 72 to 180 miles from Greene County [R 53, 54]. The State Power Authority "Plan" to import power under the power agreement is not dependent upon the Blenheim-Gilboa Project No. 2685 or the proposed Breakabeen Project No. 2729 [R 56-57]. Moreover, "additional generating and transmission facilities" affecting Greene County, such as the Gilboa-Leeds line, are not necessary to the power agreement, and not the subject of the action on the Presidential Permit, and therefore are irrelevant [R 56, 92-93].

The County Planning Board further alleged that it

> "... is opposed to additional transmission corridors and lines and power plants in the County." [R 48].

This is patently insufficient to show injury resulting from issuance of the Presidential Permit because (i) under the Presidential Permit and power agreement no such corridors or lines will be constructed south of Albany before 1982 and (ii) even after that, if such corridors or lines are built, there is no assurance they would be built in Greene County [R 53-57, 93-94].

The County Planning Board further alleged that

> "... this project is unnecessary, ill planned and will cause environmental damage at its location as well as in other areas where related facilities will be built.". [R 48].

This statement is insufficient for three reasons. First, there is no allegation that environmental damage or other injury will occur in Greene County. Second, there is no allegation that such environmental damage will affect an interest of the County Planning Board. Third, the record shows that all facilities necessary to implement the power agreement, i.e., the tower and line segment authorized by the Presidential Permit and the remainder of the line connecting said tower with Utica will be constructed at distances of 72 to 180 miles from Greene County [R 53-54, 93-94].

The County Planning Board further alleged that "the proposals do not accord with any sensible notion of comprehensive planning". [R 48]. Since issuance of the Presidential Permit or the implementation of the power agreement is not alleged to and will not have any impact on planning in Greene County, this allegation is merely an expression of a "value preference", patently insufficient under Sierra Club v. Morton, supra.

Lastly, the County Planning Board opposed the project because

> " ... it is being considered separate and apart from planned facilities for base load generation in ... Greene County, as well as the present proceedings concerning Project No. 2685, in which the Planning Board is a party Intervenor, and Project No. 2729 in which the Planning Board has intervened." (Emphasis added). [R 48].

Clearly, any injury in fact to Greene County from unrelated proceedings for Project Nos. 2685 and 2729 and other unrelated "base load generation" cannot substitute for the lack of any injury in fact stemming from the Presidential Permit proceeding.

IV. THE FPC LAWFULLY ISSUED THE PRESIDENTIAL PERMIT WITHOUT COMPLYING WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) BECAUSE CONGRESS IN ENACTING SECTION 7(d) OF THE ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974 (ESECA) EXEMPTED THE ISSUANCE OF THE PERMIT FROM ALL PROVISIONS OF NEPA.

A. The stated statutory purpose of Section 7(d) of ESECA could only have been accomplished by a complete exemption from NEPA.

The purpose of Congress in enacting Section 7(d) is manifested by its plain language to "expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to reduce the shortage of petroleum products in the United States". Congress' purpose was issuance of this Permit without further delay so that the benefits of the power agreement could be realized at the earliest possible moment. The scope of the exemption from NEPA contained therein must be discerned in the context of this overriding Congressional purpose.

The County Planning Board concedes that the explicit Congressional purpose of Section 7(d) was expedition. It then inconsistently argues that Section 7(d) merely exempted the FPC from "one potentially time-consuming requirement of law", i.e., Section 102(2)(C) of NEPA, and that the FPC was still required to comply with all other time-consuming requirements of Section 102 of NEPA.[7] That interpretation

---

7 As this Court has recognized: "Delay is a concomitant of the implementation of the procedures prescribed by NEPA. ..." Greene County Planning Board v. FPC, 455 F. 2d 412, 422 (2d Cir. 1972).

would completely undermine Congress' explicit purpose to expedite.[8] A complete exemption from all provisions of NEPA was necessary to achieve the purpose of Section 7(d), since it is "axiomatic that statutes are to be interpreted, whenever possible, to effectuate their underlying purpose and intention". Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F. 2d 841 (2d Cir. 1963); Billik v. Berkshire, 154 F. 2d 493, 494 (2d Cir. 1946).

B. The exemption from NEPA in Section 7(d) of ESECA parallels the provisions of the Trans-Alaska Pipeline Authorization Act which also confers a complete exemption from NEPA and contrasts with Section 7(c) of ESECA which confers only a limited exemption from NEPA.

County Planning Board's claim that the exemption from NEPA in Section 7(d) of ESECA is only partial is bottomed upon a purportedly fundamental difference between on the one hand the language and purpose of Section 7(d) of ESECA and on the other hand the exemption from NEPA contained in the Trans-Alaska Pipeline Authorization Act (TAPA), 43 U. S. C. §1651 et seq. County Planning Board concedes, as it must,[9] that TAPA

---

8 The County Planning Board urges this Court to, in effect, nullify the Congressional exemption by infusing NEPA with the properties of Hydra.

9 Wilderness Society v. Morton, 495 F. 2d 1026 (D. C. Cir. 1974) (en banc), 495 F. 2d 1039 (MacKinnon, J. dissenting), cert. granted sub nom., Alyeska Pipeline Service Co. v. Wilderness Society, 43 U. S. L. W. 3208 (1974).

effected a total exemption from NEPA for the Alaska Pipeline project. Yet, it chooses to ignore the striking parallel of TAPA with Section 7(d) of ESECA. First, the purpose of Congress in enacting TAPA was also to expedite prompt construction which would alleviate the domestic shortage of petroleum products. In TAPA Section 1651 Congress specifically found:

> "(a) The early development and delivery of oil and gas and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." (Emphasis added).

Similarly, TAPA Section 1652 (a) provides:

> "The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment ..." (Emphasis added).

Second, in that Act, Congress also couched its NEPA exemption for the pipeline in terms substantially the same as those used in Section 7(d) of ESECA. TAPA Section 1652(d) provides:

> "The actions taken pursuant to this chapter which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969. ..." (Emphasis added).

The reference to "further action" under NEPA was necessary because Congress established its complete exemption by approving an existing

Environmental Impact Statement prepared by the responsible agency, but which had not yet been judicially reviewed under NEPA. Such reference in Section 7(d) of ESECA was unnecessary because Congress became involved before NEPA compliance was commenced.

The County Planning Board also argues that Section 7(c) of ESECA points up Congress' awareness of the distinction between the environmental statement requirement of NEPA Section 102(2)(C) and all of NEPA because -- in contrast to Section 7(d) -- Congress in Section 7(c) used the language "the full provisions of the National Environmental Policy Act".

ESECA Section 7(c)(2) provides:

> "No action under section 2 of this Act for a period of one year after initiation of such action shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. However, before any action under section 2 of this Act that has a significant impact on the environment is taken, if practicable, or in any event within sixty days after such action is taken, an environmental evaluation with analysis equivalent to that required under section 102(2)(C) of the National Environmental Policy Act, to the greatest extent practicable within this time constraint, shall be prepared and circulated to appropriate Federal, State and local government agencies and to the public for a thirty-day comment period after which a public hearing shall be held upon request to review outstanding environmental issues. Such an evaluation shall not be required where the action in question has been preceded by compliance with the National Environmental Policy Act by the appropriate Federal agency. Any action taken under section 2 of this Act which will be in effect for more than a one-year period or any action to extend an action taken

> under section 2 of this Act to a total period of more than one year shall be subject to the full provisions of the National Environmental Policy Act, notwithstanding any other provision of this Act." (Emphasis added).

The emphasized language in the quote from Section 7(c)(2) demonstrates that when Congress desires to provide only a limited exemption from NEPA it limits the exemption by specifically providing that other action "shall be subject to the full provisions of the National Environmental Policy Act". In contrast, Congress did not in Section 7(d) add a limitation on the exemption from NEPA.

C. The legislative history of ESECA confirms that Congress intended in enacting Section 7(d) to create a complete exemption from NEPA.

As the Supreme Court stated in United States v. Public Utilities Commission, supra:

> "Where the words [of the statute] are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining Congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute." (Emphasis added). 345 U. S. at 315.

County Planning Board urges an interpretation based upon some of the "literal words" of Section 7(d) which would achieve a result contrary to the explicit purpose of Section 7(d). The Conference Report provides that Section 7 contained "an exemption of a Canada-New York State transmission line from the requirements of the National Environmental Policy

Act". 1974 U. S. Code Cong. & Ad. News at 3320. Thus the legislative history readily confirms a Congressional purpose explicit in the plain language of Section 7(d) to achieve expedition by granting a complete exemption from all requirements of NEPA.

V. THE FPC FULLY COMPLIED WITH ALL SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF EXECUTIVE ORDER 10485, THE REGULATIONS UNDER THAT ORDER, AND SECTION 7(d) OF ESECA IN ISSUING THE PERMIT AND ORDER.

The legal authority for issuance of the Presidential Permit and Order is Executive Order 10485 and the Regulations thereunder. The Executive Order does not require a decision based upon the record after an opportunity for hearing. Therefore, the substantial evidence test is inapplicable. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971). Assuming arguendo there is law to apply,[10] the standard for judicial review is whether the action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." This includes whether all relevant factors were considered. 401 U.S. at 413-414.

Under the Executive Order the FPC was required to (1) find the issuance of the Permit to be consistent with the public interest, (2) obtain the favorable recommendations of the Secretary of State and the Secretary of Defense, and (3) attach such conditions to the Permit as required in the public interest. The Executive Order also authorized the FPC to prescribe regulations and procedures in its discretion for the issuance of Presidential Permits.

---

10 See text supra, pp. 28-30.

The regulations under the Executive Order, 18 C.F.R. §§32.50 - 32.52, establish who must apply, the contents of an application, and provide that an applicant must furnish additional information as the FPC may deem pertinent.[11]

Section 7(d) of ESECA authorized and directed issuance of the Permit pursuant to the Executive Order without compliance with NEPA to facilitate prompt construction of the tower and line segment in order that a reduction in the shortage of petroleum products could be achieved.

As shown below, the FPC fully complied with all such requirements.

A. The FPC finding that the issuance of the Presidential Permit was in the public interest in the proper conduct of the foreign relations of the United States was not arbitrary or capricious because it was based upon the recommendations of the Secretary of State and the Secretary of Defense and the finding of Congress in Section 7(d) of ESECA that issuance of this Permit would further the U.S. foreign policy of reducing our dependence on foreign oil.

A requirement of a finding in the public interest does not confer upon an agency unlimited power or unfettered discretion. Rather, discretion to act in the public interest is confined by the context and legal framework under which the action is taken. Federal Radio Commission v.

---

11 Full compliance with these regulations is evident from an examination thereof and perusal of the State Power Authority's Application and the State Power Authority's supplemental information [R 1-12, 100-119].

Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 285 (1933); New York Central Securities Corp. v. United States, 287 U.S. 12, 24 (1932). Thus, the FPC finding that the issuance of the Permit is consistent with the public interest must be reviewed in light of the Constitutional powers exercised in Executive Order 10485.

In the context of the President's Constitutional foreign affairs power, and power as Commander In Chief, the public interest finding is based upon the favorable recommendations of the Secretary of State and the Secretary of Defense [R 120-129]. [12]

Although the County Planning Board claims that a myriad of relevant factors under the Federal Power Act were not considered, [Brief p. 35] it failed to demonstrate in the proceeding or the Permit that any factor relevant to the public interest in the proper conduct of the foreign relations of the United States was not considered. The public interest finding is also based upon and implements the directive of Congress in Section 7(d) of ESECA to expedite prompt construction of facilities for the importation of hydroelectric energy so as to reduce our dependence on foreign oil.

---

12 The County Planning Board asserts that both the Secretaries of Defense and State "erroneously believed that the sole purpose for the Canadian Connection was to bring power into the United States". The record [R 123] shows that the Secretaries were furnished copies of the State Power Authority's Application and letter supplementing the Application and the Power Agreement with Hydro-Quebec, each of which reveals that power would also be exported to Canada [See R 5; R 100; and R 102, 103, 109]. This Court should not presume that the Secretaries ignored relevant information in exercising their responsibilities.

B. The FPC did not abuse its discretion under Executive Order 10485 in denying the request for a public hearing because the County Planning Board failed to raise any genuine issues of relevant fact and it was provided basic procedural due process; nor did the FPC abuse its discretion in refusing to consolidate the proceeding under Executive Order 10485 or the Presidential Permit with the proceedings under the Power Act on the two hydroelectric projects because the Presidential Permit proceeding was based upon different legal authority and did not present common questions of law or fact.

There is no hearing requirement in Executive Order 10485, the regulations under that Order, or Section 7(d) of ESECA. Indeed, under the Executive Order the FPC was authorized to prescribe "such procedures" as it deemed necessary in the exercise of the President's authority thereunder.

Where no due process or statutory right to a public hearing exists, the FPC has discretion to select the procedures appropriate to the circumstances. That selection is subject to judicial review for abuse of discretion. Mobil Oil Corp. v. FPC, 483 F. 2d 1238, 1253-1254 (D.C. Cir. 1973). Cf. United States v. Florida East Coast R. Co., 410 U.S. 224 (1973).

In its discretion the FPC afforded County Planning Board notice, an opportunity to file a petition to intervene, an opportunity to file a protest, and an opportunity to petition for rehearing. Through such procedures and in acting on County Planning Board's intervention and

rehearing petitions, the FPC clearly afforded County Planning Board fundamental procedural due process of notice and an opportunity to be heard in this proceeding. In light of the Congressional finding in Section 7(d) of ESECA that construction should be expedited and the failure of the County Planning Board to allege genuine issues of fact relevant to the State Power Authority's Application for a Presidential Permit, the FPC did not abuse its discretion in denying the request for a public hearing [R 150]. Citizens For Allegan County, Inc. v. FPC, 414 F. 2d 1125 (D.C. Cir. 1969); International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 629-631 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F. 2d 846, 849-850 (D.C. Cir. 1972).

An agency has extraordinary discretion in determining whether proceedings should be consolidated. A court should respect an agency's determination in this regard absent a violation of the basic requirements for protection of private and public interest. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); U.S. v. Northern Pacific R. Co., 288 U.S. 490, 501 (1933). The denial of the County Planning Board's request for consolidation of proceedings on the Presidential Permit with those on the Blenheim-Gilboa and Breakabeen hydroelectric projects did not violate such basic requirements.

In the proceeding on the Gilboa-Leeds 345 kv transmission line in Project No. 2685 the Commission must decide pursuant to Section 10(a) of the Power Act whether that line as part of that hydro-

electric project is best adapted to a comprehensive plan of development of the waterway on which the project is located. An environmental impact statement has been prepared, full public hearings have been conducted, and the right to present testimony and cross-examine has been afforded all parties. The County Planning Board has participated as an intervenor in that proceeding. An initial decision has been issued by the Administrative Law Judge. A final decision by the FPC - and no doubt judicial review thereof - is required to complete the proceeding.

Since the proceeding on the Blenheim-Gilboa hydroelectric project is being conducted under the Power Act and the proceeding on the Presidential Permit was conducted under Executive Order 10485, the two are based on different legal authority and do not present common questions of law or fact. Moreover, consolidation would result in further delay in the availability of a transmission line independently required to assure the reliability and stability of Project No. 2685 and would preclude prompt implementation of the power contract with Hydro-Quebec.

For the same reasons, consolidation with the proceeding on Breakabeen hydroelectric project would have been unjustified and contrary to the public interest. Public hearings, including presentation of testimony and cross-examination on all relevant issues will, of course, be afforded as required by law. The County Planning Board's petition to intervene in that proceeding has been granted and it is participating as

a party. The FPC is now preparing its environmental impact statement. Consequently there will be a full review of all issues relevant to the Breakabeen Project.

Accordingly, the FPC did not abuse its discretion in denying consolidation.

CONCLUSION

The petition for review should be dismissed with prejudice for want of jurisdiction. The petition for review should be dismissed with prejudice for want of justiciability. In the alternative, the Presidential Permit and Order should be affirmed.

Respectfully submitted,

SCOTT B. LILLY
Attorney for
Power Authority of
the State of New York
10 Columbus Circle
New York, New York 10019
(212) 265-6510

OF COUNSEL:

Morgan, Lewis & Bockius
1140 Connecticut Avenue, N. W.
Washington, D. C. 20036

May 13, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Intervenor Power Authority of the State of New York by mailing copies as follows:

Party	
GREENE COUNTY PLANNING BOARD	Kafin and Needleman, Esqs. 115 Maple Street Glens Falls, New York 12801
FEDERAL POWER COMMISSION	Federal Power Commission 825 N. Capitol St., N. E. Washington, D. C. 20426

Vincent J. Tobin

Vincent J. Tobin

Power Authority of the State of New York
10 Columbus Circle
Suite 1800
New York, New York 10019
212-265-6510

May 13, 1975